Majlis Perbandaran Seberang Perai v Tropiland Sdn Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO P 02-11-96
GOPAL SRI RAM, MOKHTAR SIDIN AND NH CHAN JJCA
22 AUGUST 1996

Administrative Law *— Exercise of administrative powers — Local authority — Exercise of discretion — Refusal to issue certificate of occupation — Developer challenged refusal on ground of illegality or 'Wednesbury unreasonableness' — Whether court merely examines decision-making process — Whether court must examine correctness of decision itself on merits*

Administrative Law *— Exercise of administrative powers — Local authority — Exercise of discretion — Refusal to issue certificate of occupation — Developer challenged refusal on ground of illegality or 'Wednesbury unreasonableness' — Correctness of local authority's decision — Trial judge granted declaration that local authority acted ultra vires the law and unreasonably — Trial judge did not appreciate facts of case — Whether declaration granted by judge should be set aside*

Administrative Law *— Exercise of administrative powers — Local authority — Exercise of discretion — Layout and earthworks plans approved with conditions attached — Developer was to construct moonsoon drain on adjoining state land and perimeter drain on own land — Developer resubmitted layout plan due to alteration done to building — Perimeter drain not drawn into amended plan which was approved by local authority — Squatters living on adjoining state land — Developer completed 80% of moonsoon drain and did not construct perimeter drain — Whether local authority had acted unreasonably in refusing to grant certificate of occupation — Whether court must examine correctness of decision itself on merits or decision-making process*

The respondent owned a piece of land in Seberang Prai, and it wanted to construct a 11-storey commercial building on it. It hired an architect who drew up and submitted the earthworks and layout plans to the local authority of Seberang Perai ('the appellant') for approval. The layout plan was approved by the appellant with the condition that the respondent had to construct a monsoon drain on the adjoining state land. The earthworks plan, which was approved subsequently, came with the condition that the respondent construct a perimeter drain on the respondent's land. The respondent then commenced construction. However, the respondent later had to submit an amended layout plan to the appellant, because it wanted to construct a five-storey instead of the original 11-storey building. The perimeter drain was not drawn into the amended layout plan. The appellant approved the amendment. After the building was completed, the respondent applied to the appellant for a certificate of occupation. The appellant refused to issue the certificate, principally on the ground that the respondent had failed to comply with the conditions, ie the respondent had only constructed about 80% of the

monsoon drain, and did not construct the perimeter drain at all. The respondent took out an originating summons claiming declarations to the effect that the appellant's refusal to issue the certificate of fitness for the building was unlawful. The respondent contended that it was unreasonable for the appellant to impose the conditions because: (i) there were squatters on the state land, which the respondent lacked locus standi to enter; (ii) the respondent had a legitimate expectation that the state land would be made available to it by the appellant; and (iii) the area of the respondent's land on which the perimeter drain was to be constructed had to be surrendered to the Jabatan Kerja Raya for the construction of a road. The trial judge took the view that the appellant was acting ultra vires the Town and Country Planning Act 1976 and had committed 'Wednesbury unreasonableness' in imposing the conditions. In the case of the perimeter drain, the judge relied on the extrinsic evidence rule housed in ss 91, 92 and 93 of the Evidence Act 1950 to justify his conclusion that the approved amended layout plan and the earthworks plan ought not to be read together. As the perimeter drain was not drawn into the approved amended plan, the judge held that the requirement to construct the perimeter drain was a new requirement as a condition for the issue of the certificate of fitness, and the appellant had thus acted unreasonably. The trial judge accordingly granted declarations that the appellant was not entitled in law nor justified in the exercise of discretion to require the respondent as conditions for the issuance of an occupation certificate: (i) to construct a perimeter drain on the land ('the first declaration'); and (ii) to complete the construction of the monsoon drain on state land with the presence of illegal structures on state land ('the second declaration'). The judge further ordered damages to be assessed by the senior assistant registrar of the High Court in respect of the loss and damage suffered by the respondent. The appellant appealed.

Held, allowing the appeal:

(1) Until very recently, it was thought that when the exercise of discretion by a public decision-maker is challenged on the ground of illegality or 'Wednesbury unreasonableness', the court merely examines the decision-making process and not the correctness of the decision itself on merits. The fallacy of this approach has now been exposed by the majority decision of the Federal Court in *Ramachandran v The Industrial Court of Malaysia* Civil Appeal No 02–13–94, yet unreported (see p 105B–C).

(2) It follows that when the exercise of discretion by a public body, such as the appellant, is challenged, a court must examine the facts and determine whether the decision arrived at is reasonable. If it is, then, it is safe from attack. If it is not, then,

the appropriate remedy may be given. In the present case, the judge concluded that the appellant had acted ultra vires and unreasonably. In the light of the law in its present state, his decision really turns upon his appreciation of the facts of the case (see p 106C–D). A

(3) Although the High Court had jurisdiction to grant the first declaration in regard to the monsoon drain, it is equally settled that the remedy is discretionary in nature (see p 107H–I); *Faber Merlin (M) Sdn Bhd & Ors v Lye Thai Sang & Anor* [1985] 2 MLJ 380 and *Arab-Malaysian Credit Bhd v Tan Seang Meng* [1995] 1 MLJ 525 followed. B

(4) The judge ought to have borne in mind that he was being moved for a remedy that was essentially discretionary in nature. He ought to have refused it in the light of the facts made known to him in the affidavits (see p 107F). C

(5) In this appeal, the condition relating to the construction of the monsoon drain was there from the very beginning, and was not subsequently imposed upon the respondent. The respondent not only remained silent for three years after the imposition of the condition, but also completed 80% of the work before taking objection. In these circumstances, the doctrine of legitimate expectation has no application whatsoever to the facts of the present appeal. There was nothing unreasonable, in the circumstances of this case, in the appellant's insistence that the respondent fulfil the conditions subject to which planning permission was granted. It followed that the judge was wrong in granting the first declaration (see p 109B–D); *Sykt Bekerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan Bhd v Majlis Perbandaran Pulau Pinang* [1996] 2 MLJ 697 distinguished. D E F

(6) There may be several pieces of written law, both Acts of Parliament and subsidiary legislation, that regulate the development of land and the construction of or alteration to buildings. Anyone proposing to engage in land development must observe the provisions of all the written laws that regulate this form of human activity. It was, therefore, quite wrong for the judge to proceed upon the basis that compliance with the conditions attaching to the planning permission granted under the Town and Country Planning Act 1976 was quite sufficient. Regard must also be had to the equally compelling provisions of the Street, Drainage and Building Act 1974 which govern the carrying out of earthworks (see pp 111G–I and 112A). G H

(7) The judge made the assumption that all the necessary earthworks had been completed at the date when the respondent's amended plan was approved. As a matter of pure fact, the assumption made was wrong because the perimeter drain, which was very much a part of the earthworks, was I

never constructed. It followed that the reasoning of the judge lacked the necessary factual basis and his conclusion upon the point was a *non sequitur* (see p 112G).

(8) The authorities referred to and relied upon by the judge that dealt with the extrinsic evidence rule deal with bilateral instruments in private law. The judge failed to realize that he was dealing with a public law case and not a construction summons taken out to interpret the clauses in a private document. That led him to the error into which he fell (see p 113A–D).

(9) In the present case, the original plan for an 11-storey building, the earthworks plan and the amended plan for a five-storey building were all related to the same project. For that reason, they must be read together. The judge was wrong when he said the opposite. It followed that it was no answer for the respondent to say that it had met with all the conditions appearing on the approved amended layout plan. It must also comply with the conditions that appear on the earthworks plan. The condition about the perimeter drain might not appear on the approved amended layout plan, but it appeared on the earthworks plan. That was sufficient. The judge was wrong in treating it as a condition that was imposed later by the appellants. Acting upon an erroneous fact pattern, he applied the dictum of Mohd Dzaiddin J in *Rethina Development*. That was certainly a misdirection. It had occasioned a miscarriage of justice in this case (see p 113E–G).

(10) The last point made by the judge was that the condition in question gives rise to an absurdity because the perimeter drain, if constructed, would run along the centre of a road to be constructed by the respondent and JKR. However, having read with care the three plans earlier mentioned, this court was satisfied that the absurdity referred to by the judge did not exist (see p 113H–I).

(11) It could not be said that the appellant was acting unreasonably in withholding the certificate of fitness. That the law requires them to act as they have done is borne out by by-law 25(1)(b) of the Uniform Building By-Laws 1984 (being subsidiary legislation made under the Street, Drainage and Building Act 1974) which provides, inter alia, that certificate of fitness for occupation of a building shall be given when all essential services, including drains, have been provided. For these reasons, the judge was wrong in granting the respondent the second declaration (see p 114A–C).

(12) The respondent did not ask for an *award* of damages, but merely an *assessment* in its summons. This was altogether wrong. Before an inquiry into or an assessment of damages may take place, there must be a judgment awarding damages, for it is

only under a judgment awarding damages that an assessment or inquiry may take place (see p 114D–E). A

(13) In any event, it was sufficient to state that once the declarations were set aside, the order for assessment fell to the ground automatically (see p 114F).

(14) The respondent's case alleged 'Wednesbury unreasonableness', not malice. Yet, the judge held that the appellant had acted in bad faith and out of malice. Having examined the relevant material in the record provided, the court was entirely satisfied that there was absent any material to support this finding (see p 114G). B C

[Bahasa Malaysia summary

Penentang memiliki sebidang tanah di Seberang Prai, dan ia berhasrat mendirikan sebuah bangunan perdagangan 11 tingkat atas tanah tersebut. Ia menggaji seorang arkitek yang melukis dan mengemukakan pelan-pelan kerja tanah dan susun atur kepada pihak berkuasa tempatan Seberang Perai ('perayu') untuk kelulusan. Pelan susun atur telah diluluskan oleh perayu dengan syarat bahawa penentang harus membina sebuah parit monsun atas tanah negeri yang bersempadanan. Kelulusan pelan kerja tanah pada kemudiannya disusuli dengan syarat agar penentang membina sebuah parit perimeter atas tanah penentang. Penentang kemudiannya memulakan kerja pembinaan. Walau bagaimanapun, penentang kemudiannya terpaksa mengemukakan suatu pelan susun atur yang terpinda kepada perayu, sebab ia ingin membina sebuah bangunan lima tingkat dan bukan bangunan 11 tingkat yang asal. Parit perimeter tidak dimasukkan dalam pelan yang dipinda. Perayu meluluskan pindaan itu. Selepas bangunan itu selesai didirikan, penentang telah memohon kepada perayu untuk suatu sijil penghunian. Perayu enggan mengeluarkan sijil itu, terutamanya atas alasan bahawa penentang telah gagal mematuhi syarat-syarat, iaitu penentang hanya telah membina kira-kira 80% daripada parit monsun, dan tidak membina parit perimeter sama sekali. Penentang mengeluarkan suatu saman pemula menuntut perisytiharan bahawa penolakan perayu terhadap pengeluaran perakuan kelayakan bagi bangunan itu menyalahi undang-undang. Penentang berhujah bahawa adalah tidak munasabah bagi perayu mengenakan syarat-syarat sebab: (i) terdapatnya setinggan atas tanah negeri, dan penentang tidak mempunyai locus standi untuk masuk; (ii) penentang mempunyai jangkaan sah bahawa tanah negeri akan disediakan kepadanya oleh perayu; dan (iii) kawasan tanah penentang atas mana parit perimeter akan dibina harus diserah kepada Jabatan Kerja Raya untuk pembinaan jalan. Hakim perbicaraan berpandangan bahawa perayu telah bertindak ultra vires Akta Perancangan Bandar dan Desa 1976 dan telah melakukan 'ketidakmunasabahan Wednesbury' dalam mengenakan syarat-syarat. Dalam kes parit D E F G H I

perimeter pula, hakim telah bergantung kepada rukun keterangan ekstrinsik yang dirangkumi oleh ss 91, 92 dan 93 Akta Keterangan 1950 bagi memberi justifikasi kepada kesimpulan beliau bahawa pelan susun atur terpinda yang diluluskan dan pelan kerja tanah tidak patut dibaca bersama. Oleh kerana parit perimeter tidak dilukis dalam pelan terpinda yang diluluskan, hakim membuat keputusan bahawa keperluan untuk membina parit perimeter adalah satu keperluan baru sebagai satu syarat untuk pengeluaran perakuan kelayakan, dan dengan itu perayu telah bertindak secara tidak munasabah. Ekoran itu, hakim perbicaraan memberikan perisytiharan bahawa perayu tidak berhak dalam undang-undang mahupun mempunyai justifikasi dalam pelaksanaan budi bicara untuk menghendaki penentang, sebagai syarat untuk pengeluaran suatu perakuan penghunian, untuk: (i) membina sebuah parit perimeter atas tanah tersebut ('perisytiharan pertama'); dan (ii) untuk menyempurnakan pembinaan parit monsun atas tanah negeri walaupun terdapat struktur yang menyalahi undang-undang atas tanah negeri ('perisytiharan kedua'). Hakim seterusnya membuat perintah supaya ganti rugi ditaksir oleh penolong kanan pendaftar Mahkamah Tinggi berhubung dengan kerugian dan kerosakan yang dialami oleh penentang. Perayu membuat rayuan.

Diputuskan, membenarkan rayuan:

(1) Sehingga baru-baru ini, ia dianggap bahawa apabila pelaksanaan budi bicara oleh badan membuat keputusan awam dicabar atas alasan menyalahi undang-undang atau 'ketidakmunasabahan Wednesbury', mahkamah hanya memeriksa proses membuat keputusan dan bukan ketepatan keputusan sendiri atas merit. Falasi pendekatan ini kini telah dihancurkan oleh keputusan majoriti Mahkamah Persekutuan dalam *Ramachandran v The Industrial Court of Malaysia* Rayuan Sivil No 02–13–94, belum dilaporkan (lihat ms 105B–C).

(2) Ini bermakna bahawa apabila pelaksanaan budi bicara oleh badan awam, misalnya perayu, dicabar, sesebuah mahkamah mestilah meneliti fakta-fakta dan menentukan sama ada atau tidak keputusan yang dibuat adalah munasabah. Jika ianya munasabah, maka ianya selamat daripada kritikan. Jika tidak, maka remedi yang wajar boleh diberikan. Dalam kes ini, hakim telah membuat kesimpulan bahawa perayu telah bertindak ultra vires dan dalam cara yang tidak munasabah. Memandangkan undang-undang dalam keadaan sekarang, keputusan beliau benar-benar bertentangan dengan ulasan beliau atas fakta kes (lihat ms 106C–D).

(3) Walaupun Mahkamah Tinggi mempunyai bidang kuasa untuk memberi perisytiharan pertama berkaitan dengan parit monsun, adalah mantap bahawa remedi itu adalah mengikut budi bicara (lihat ms 107H–I); *Faber Merlin (M) Sdn Bhd & Ors v Lye*

Thai Sang & Anor [1985] 2 MLJ 380 dan *Arab-Malaysian Credit Bhd v Tan Seang Meng* [1995] 1 MLJ 525 diikut. A

(4) Hakim sepatutnya mengingati bahawa beliau diminta untuk suatu remedi yang pada dasarnya mengikut budi bicara. Beliau sepatutnya menolaknya memandangkan fakta-fakta yang dikemukakan padanya dalam afidavit-afidavit (lihat ms 107F). B

(5) Dalam rayuan ini, syarat yang berhubung dengan pembinaan parit monsun memang ada dari permulaan, dan bukanlah dikenakan kemudiannya atas penentang. Penentang bukan sahaja mendiamkan diri selama tiga tahun selepas pengenaan syarat, malah juga telah menyempurnakan 80% kerja sebelum membuat bantahan. Dalam keadaan ini, doktrin jangkaan sah tidak terpakai sama sekali terhadap fakta-fakta rayuan ini. Tiada apa-apa yang tidak munasabah, dalam keadaan kes ini, dalam tegasan perayu agar penentang memenuhi syarat-syarat tertakluk kepada pemberian kebenaran perancangan. Ini bermakna bahawa hakim adalah salah dalam memberikan perisytiharan pertama (lihat ms 109B–D); *Sykt Bekerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan Bhd v Majlis Perbandaran Pulau Pinang* [1996] 2 MLJ 697 dibeza. C D

(6) Mungkin terdapat beberapa undang-undang bertulis, termasuk kedua-dua Akta Parlimen dan perundangan subsidiari, yang mengawal pemajuan tanah dan pembinaan atau perubahan kepada bangunan. Sesiapa yang bercadang melibatkan diri dalam pemajuan tanah mesti mematuhi peruntukan semua undang-undang bertulis yang mengawal bentuk aktiviti manusia ini. Oleh yang demikian, adalah salah untuk hakim membuat keputusan atas dasar bahawa pematuhan syarat-syarat yang disertai bersama kebenaran perancangan yang diberi di bawah Akta Perancangan Bandar dan Desa 1976 adalah agak memadai. Perhatian juga mestilah diberikan kepada peruntukan dalam Akta Jalan, Parit dan Bangunan 1974 yang menguasai penjalanan kerja tanah (lihat ms 111G–I dan 112A). E F G

(7) Hakim telah membuat tanggapan bahawa kesemua kerja tanah yang perlu telah diselesaikan pada tarikh apabila pelan penentang yang terpinda diluluskan. Secara kebetulan, tanggapan yang dibuat itu adalah salah sebab parit perimeter, yang merupakan sebahagian daripada kerja tanah, tidak pernah dibina. Ekoran itu, pertimbangan hakim kekurangan asas faktual yang perlu dan kesimpulan beliau atas perkara itu adalah suatu *non sequitur* (lihat ms 112G). H

(8) Autoriti yang dirujuk oleh hakim dan yang hakim tersebut bergantung kepada, membincangkan rukun keterangan ekstrinsik yang berkenaan dengan suratcara dwipihak dalam undang-undang persendirian. Hakim gagal menyedari bahawa beliau sedang mengendalikan suatu kes undang-undang awam dan bukannya suatu saman pentafsiran yang diambil bagi I

mentafsir fasal-fasal dalam dokumen peribadi. Itulah yang mengakibatkan kesilapan hakim (lihat ms 113A–D).

(9) Dalam kes ini, pelan asal untuk sebuah bangunan 11 tingkat, pelan kerja tanah dan pelan yang dipinda untuk bangunan lima tingkat semuanya berhubung dengan projek yang sama. Atas alasan itu, mereka haruslah dibaca bersama. Hakim adalah salah apabila beliau mengatakan yang sebaliknya. Ini bermakna bahawa penentang tidak boleh mengatakan bahawa ia telah mematuhi semua syarat atas pelan susun atur terpinda yang diluluskan. Ia juga mesti mematuhi syarat-syarat atas pelan kerja tanah. Syarat mengenai parit perimeter mungkin tidak tertulis atas pelan susun atur terpinda yang diluluskan, tetapi ia muncul atas pelan kerja tanah. Ini sudah mencukupi. Hakim adalah salah dalam menganggapnya sebagai suatu syarat yang dikenakan pada kemudiannya oleh perayu. Hakim telah bertindak atas pola fakta yang salah dan memakai dictum Mohd Dzaiddin H dalam *Rethina Development*. Itu sesungguhnya merupakan suatu salah arah. Ia telah mengakibatkan suatu ketidakadilan dalam kes ini (lihat ms 113E–G).

(10) Pendapat terakhir yang telah diberikan oleh hakim ialah bahawa syarat yang berkenaan menimbulkan suatu keadaan yang tidak munasabah sebab parit perimeter, jika dibina, akan bersampingan dengan bahagian tengah sebatang jalan yang akan dibina oleh penentang dan JKR. Namun demikian, selepas membaca ketiga-tiga pelan yang disebut tadi dengan teliti, mahkamah berpuas hati bahawa keadaan tidak munasabah yang dirujuk oleh hakim tidak wujud (lihat ms 113H–I).

(11) Tidak boleh dikatakan bahawa perayu bertindak secara tidak munasabah dalam menahan perakuan kelayakan. Undang-undang yang menghendaki mereka bertindak seperti yang telah berlaku adalah tersirat dalam undang-undang kecil 25(1)(b) Undang-Undang Kecil Bangunan Seragam 1984 (yang merupakan perundangan subsidiari yang dibuat di bawah Akta Jalan, Parit dan Bangunan 1974) yang memperuntukkan, antara lain, bahawa perakuan kelayakan untuk penghunian sesebuah bangunan harus diberikan apabila semua kemudahan asas, termasuk parit, telah pun disediakan. Atas alasan-alasan ini, hakim adalah salah dalam memberikan perisytiharan kedua kepada penentang (lihat ms 114A–C).

(12) Penentang tidak meminta suatu *award* ganti rugi, tetapi suatu *taksiran* sahaja dalam samannya. Ini adalah salah pada keseluruhannya. Sebelum siasatan ke dalam atau taksiran ganti rugi boleh berlaku, mestilah terdapat suatu penghakiman yang mengawardkan ganti rugi, kerana suatu taksiran atau siasatan hanya boleh berlaku di bawah suatu penghakiman yang mengawardkan ganti rugi (lihat ms 114D–E).

(13) Bagaimanapun, adalah memadai untuk menyatakan bahawa sebaik sahaja perisytiharan diketepikan, perintah untuk taksiran secara automatik tidak boleh dilaksanakan (lihat ms 114F).

(14) Kes penentang mendakwa 'ketidakmunasabahan Wednesbury', bukan niat jahat. Namun begitu, hakim telah membuat keputusan bahawa perayu telah bertindak atas niat jahat. Selepas meneliti material yang relevan dalam rekod yang disediakan, mahkamah berpuas hati bahawa tidak terdapat sebarang material yang menyokong pendapat ini (lihat ms p 114G).]

Notes

For cases on exercise exercise of administrative powers, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1–50.

Cases referred to

Arab-Malaysian Credit Bhd v Tan Seang Meng [1995] 1 MLJ 525
Associated Provincial Picture Houses Ltd v Wednesbury Corp [1948] 1 KB 223
Council Of Civil Service Unions & Ors v Minister for the Civil Service [1985] AC 374
Faber Merlin (M) Sdn Bhd & Ors v Lye Thai Sang & Anor [1985] 2 MLJ 380
Goh Eng Wah v Yap Phooi Yin & Anor [1985] 1 MLJ 329
Keng Huat Film Co Sdn Bhd v Makhanlall (Properties) Pte Ltd [1984] 1 MLJ 243
Pengarah Tanah dan Galian Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135
Ramachandran v The Industrial Court of Malaysia (Civil Appeal No 02–13–94) (unreported)
Sykt Bekerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan Bhd v Majlis Perbandaran Pulau Pinang [1996] 2 MLJ 697

Legislation referred to

Evidence Act 1950 ss 91, 92, 93
Street, Drainage and Building Act 1974 s 70A(1), (2), (3)
Town and Country Planning Act 1976
Uniform Building By-Laws 1984

Appeal from: Originating Summons No 24–718–93 (High Court, Pulau Pinang)

Zaki Tun Azmi (*CKV Devan, K Sarasvathy* and *Vishnu Kumar* with him) (*Devan Hussin & Co*) for the appellant.

JA Yeoh (*Christina Siew* with him) (*Shearn Delamore & Co*) for the respondent.

Cur Adv Vult

Gopal Sri Ram JCA (delivering the judgment of the court): The respondent owns a piece of land in Seberang Prai which it wanted to develop. It wanted to construct a commercial building on the land. It was to be an 11-storey building with a supermarket. It hired an architect who drew up plans. Those plans had to be approved by the appellant which is the local authority in, and for, Seberang Perai. There were two plans to start with. One is what is generally called the layout plan; the other had to do with the earthworks.

Under the law, the respondent could not lawfully commence building work of any sort — including earthwork — without the approval of the appellant. It waited for the approvals to come. Eventually they came. The layout plan was approved by the appellant on 30 November 1984, while the earthworks plan was approved on 19 July 1986. The approvals came with conditions. One of the conditions required the respondent to construct or upgrade a monsoon drain on the land adjoining the respondent's property. That land belonged to the state. There were squatters on it. Constructing the monsoon drain meant having to deal with these squatters. Another condition was that the respondent had to construct a perimeter drain on its land.

The respondent commenced construction. When the third floor of the building was under construction, it had a change of heart. It did not want to have 11 storeys. It proposed to have a five-storeyed building. So it got its architect to prepare and submit an amendment to the original plan. That was approved as well, once again with conditions. There was a requirement to submit a fresh earthworks plan to the engineering department. What the appellant obviously wanted was either compliance with the conditions in the original earthworks plan or a new proposal on the drains.

The respondent constructed about 80% of the monsoon drain, dealing with the squatters as it went along. Then it ran into brick wall, as it were, with one of the squatters who, it appears, was a little adamant. At that point, the respondent stopped work on the monsoon drain.

The respondent did not construct the perimeter drain. Mr Yeoh, who appeared for the respondent on the appeal, has told us that there are good reasons for this. He has drawn our attention to the several plans and the endorsements on them. According to him, the area of the respondent's land on which the perimeter drains were to be constructed had to be surrendered to the Jabatan Kerja Raya (the Public Works Department), or 'JKR' for short, for the construction of a road. We will deal with this aspect of the case later.

Having completed the building, the respondent applied to the appellant for a certificate of occupation so that it could put the building to use. But the appellant refused to issue such a certificate principally on the ground that the respondent had failed to comply with the conditions

relating to the construction of the perimeter and the monsoon drains. Thereupon, the respondent took out an originating summons in which it claimed several declarations, the effect of which was to declare as unlawful the appellant's refusal to issue the certificate of fitness for the building in question.

When the matter came on for hearing before Vincent Ng J, the respondent withdrew the first two declarations claimed in its summons. After hearing arguments, the learned judge granted the respondent the following relief:

(i) a declaration that the defendants are not entitled in law nor justified in the exercise of discretion to require the plaintiffs, as a condition for the issuance of an occupation certificate in respect of a block of five-storey building (hereinafter referred to as 'the said building') on the plaintiffs' land known as Lots 368, 369 and 370 Mukim 15 Jalan Telaga Ayer, Butterworth (hereinafter referred to as 'the said land'), to construct a perimeter drain along the eastern and southern boundary of the said land;

(ii) a declaration that the defendants are not entitled in law nor justified in the exercise of discretion to require the plaintiffs, as a condition for the issuance of an occupation certificate in respect of the said building on the said land, to complete the construction of the monsoon drain on state land notwithstanding the presence of unauthorized and/or illegal structures on state land; and

(iii) damages to be assessed by the senior assistant registrar of the High Court in respect of the loss and damage suffered by the plaintiffs on account of the defendants' failure and/or refusal to date to issue an occupation certificate in respect of the said building on the said land.

He also awarded the respondent the costs of the action.

The judge granted the declarations in question because he thought that the appellant was acting outside the law and unreasonably in imposing the conditions about the perimeter and monsoon drains. In doing so, he relied on the Delphic pronouncement by Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223. The proposition which that case established is that a public decision-maker on whom statute confers a discretion must exercise it reasonably. It has been applied in numerous cases throughout the commonwealth. We too have incorporated it as part of our common law. See *Pengarah Tanah dan Galian Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135 at pp 146 and 148. The principle is so well established that, as a ground of challenge, it has come to be known as 'Wednesbury unreasonableness'.

In *Council Of Civil Service Unions & Ors v Minister for the Civil Service* [1985] AC 374, Lord Diplock listed four grounds on which a decision in

public law may be challenged. They are, he said, 'illegality', 'irrationality', 'procedural impropriety' and 'proportionality'. He placed 'Wednesbury unreasonableness' within the 'irrationality' category.

Until very recently, it was thought that when the exercise of discretion by a public decision-maker is challenged on the ground of illegality or 'Wednesbury unreasonableness', the court merely examines the decision-making process and not the correctness of the decision itself on merits. The fallacy of this approach has now been exposed by the majority decision of the Federal Court in *Ramachandran v The Industrial Court of Malaysia* Civil Appeal No 02–13–94, yet unreported. It is a landmark decision. It stands as a beacon lighting the path of future development in the field of public law. Edgar Joseph Jr FCJ, who delivered one of the majority judgments, exploded the theory that judicial review is *always* concerned only with the decision-making process and never with the decision itself. This is what he said (at pp 8–11 of the transcript):

> Lord Diplock's first ground for challenge — namely, *illegality* — involves insisting that the authority or body whose decision is being impugned has kept strictly within the perimeters of their powers. A good example of this is the case of *Westminster City Council v Great Portland Estates plc* [1985] AC 661, an ultra vires case involving judicial construction of the Town and Country Planning Act 1971. The question for decision was whether the Act permitted the relevant authorities, by resort to their development plans, to support the retention of traditional industries or was the ambit of the Act such as to permit only 'land use' aims to be pursued? It was held that 'the character of the use of the land not the particular purpose of a particular occupier' was the concern of planning, and therefore, the authority could not seek to favour any particular occupant or class of occupant. By thus confining the relevant authority strictly to the four walls of the powers conferred upon them by the Act, the court was involved in the exercise of reviewing the impugned decision for *substance* and not just *process*.
>
> Lord Diplock's second ground for challenge — namely, *irrationality* — recognizes a different route whereby the *substance* of a decision may be reviewed by the courts. By this means, Lord Diplock made it clear that despite being legal — that is to say, within the powers conferred — a decision may nevertheless be struck down for being contrary to *substantive principles*. In the words of Lord Diplock:
>
> > ... a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.
>
> In this regard, the case of *Hall & Co Ltd v Storeham-By-Sea UDC* [1964] 1 All ER 1, a planning case, affords a good illustration of how the courts in the United Kingdom do in practice review a decision for *substance* even though it may comply with the legislative scheme. The defendant had granted the plaintiffs planning permission subject to conditions that required them to construct a road on their land and dedicate its use to the public. No compensation was payable to them for the loss of the land to be used for the

> road. Under town and country planning law, a local authority may, in granting planning permission, impose such conditions as it may think fit. The court struck down the condition, one of the grounds being that the condition was void for unreasonableness. On the one hand, while viewed from a traffic engineering point of view, the defendant's object was 'perfectly reasonable', but on the other hand, the course they adopted was 'utterly unreasonable'. In effect, the court had examined the decision for *substance*, and held that the imposition of the condition was an abuse of power and unlawful. It is implicit in this decision that the court was indirectly enforcing the fundamental civil right to be compensated adequately for property compulsorily acquired.

It follows that when the exercise of discretion by a public body, such as the appellant, is challenged, a court is entitled to — indeed it must — examine the facts and determine whether the decision arrived at is reasonable in the sense described by Edgar Joseph Jr FCJ in the foregoing passage. If it is, then, it is safe from attack. If it is not, then, the appropriate remedy may be given.

In the present case, the learned judge, as earlier observed, concluded that the appellant had acted ultra vires and unreasonably. In the light of the law in its present state, his decision really turns upon his appreciation of the facts of the case.

Against the judge's decision, the appellant local authority has now appealed to us. Dato Zaki, who appeared for it, has argued the appeal with his usual ability. He has taken us through the relevant affidavits and plans to show that the learned judge came to the conclusion that the appellant had acted unreasonably because he had not fully appreciated the evidence before him. In short, there was no judicial appreciation of the facts. Dato Zaki has demonstrated beyond any doubt that the conditions about which the respondent complains are not new ones imposed mid-stream at the whims and fancies of the appellant. They were there all along and the respondent took on the development of its land fully cognizant of the ramifications that were entailed. In a nutshell, the appellants had not acted either high-handedly or unreasonably. And there was certainly no bad faith on their part.

We think that there is merit in the arguments presented by Dato Zaki. We will deal with the two points of essential contention between the parties.

In the case of the monsoon drain, there is abundant evidence that the respondent knew that it had to be constructed on state land. It knew, or must be taken to know, of the presence of squatters. Yet it did not complain about the condition at the time it was imposed. It did not appeal against the imposition of the condition. If its appeal had been unsuccessful, it may have moved for certiorari to quash the condition. But, as we have

already observed, it did none of these things. And there is a reason for its earlier reticence. Locating the monsoon drain on state land meant that the respondent had the use of all its land. Had the monsoon drain been relocated on the respondent's land, it would have meant having to give up a portion of its land. That is probably why it initially accepted the condition on the layout plan.

Mr Yeoh, who appeared for the respondent, has said in answer that the condition imposed by the appellant did not require his client to construct or upgrade the monsoon drain irrespective of the presence of squatters. Had the appellant imposed such a condition on the layout plan, said Mr Yeoh, the respondent would have lodged an appeal for the removal of the condition. He argued that it is unreasonable of the appellants to expect the respondent to enter upon state land and deal with squatters when the respondent lacks locus standi to do so.

The short answer to Mr Yeoh's argument is that, the condition requiring the construction or the upgrading of the monsoon drain cannot, and should not, be read *in vacuo*. It must be read in the light of the circumstances prevailing at and about the site at which the the respondent proposed to construct its building. At the time the condition was indorsed on the layout plan, the respondent knew, or must be taken to have known, of the status of the land on which the monsoon drain was required to be constructed. The respondent must have been aware that state land was involved. It must have known about the squatters. But it did nothing for three years. We do not think it ought to be heard to complain now. The judge ought to have borne in mind that he was being moved for a remedy that was essentially discretionary in nature. He ought to have refused it in the light of the facts made known to him in the affidavits.

When this point was put to Mr Yeoh, he countered with the argument that the court had jurisdiction to grant the first declaration in regard to the monsoon drain. He referred us to the earlier proceedings in this case. Azmel J had dismissed the action for want of jurisdiciton. The respondent appealed to the (then) Supreme Court which ruled that the High Court did have jurisdiction to grant the declarations sought. Mr Yeoh submitted that the matter was now closed and the issue of the High Court's jurisdiction could not now be re-agitated.

With respect, we are unable to accept Mr Yeoh's argument. It overlooks the vital difference between jurisdiction and discretion in the context of declaratory relief. No doubt that the High Court has jurisdiction to grant such relief. But it is equally settled that the remedy is discretionary in nature. A plaintiff who establishes his right may nevertheless be refused declaratory relief in certain circumstances, eg where he is guilty of laches or other unconscionable conduct. See *Faber Merlin (M) Sdn Bhd & Ors v Lye Thai Sang & Anor* [1985] 2 MLJ 380 at p 384.

The answer to Mr Yeoh's argument, we believe, lies in the following passage of the judgment of this court in *Arab-Malaysian Credit Bhd v Tan Seang Meng* [1995] 1 MLJ 525 (at p 534):

> Now, it is one thing to say that a court has no power to make an order or to grant relief and quite a different thing to say that a particular order or relief will not, in accordance with settled principles, be granted. A refusal in such circumstances is in fact an exercise of jurisdiction and not a denial of it. This important distinction of principle is well brought out by the following passage in the advice of the Privy Council delivered by Lord Diplock in *Rediffusion (Hong Kong) Ltd v A-G of Hong Kong* [1970] AC 1136; [1970] 2 WLR 1264 which was applied by our Federal Court in *Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29:
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> > When considering an action claiming relief in the form of discretionary remedies only it is thus important to distinguish between the jurisdiction of the court to entertain the action at all, ie to embark upon the inquiry whether facts exist which would entitle the court to grant the relief claimed, and a settled practice of the court to exercise its discretion by withholding the relief if the facts found to exist disclose a particular kind of factual situation. The application of a discretion to refuse relief even though this may be pursuant to a settled practice is an exercise of jurisdiction, not a denial of it.
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> Although those words were spoken in the context of declaratory relief, they are of universal application ...

Mr Yeoh has also argued that the respondent had a legitimate expectation that the state land on which the monsoon drain was to be constructed would be made available to it by the appellant. Counsel conceded that he did not raise or argue this point before the High Court. It is, therefore, an entirely new point. Had it been raised, the appellant may have wanted to put in some evidence on it. It cannot do so now. Mr Yeoh, however, argued that no further evidence is necessary. We are not certain that he is right in his argument. But we will assume that he is. Yet the point does not avail his client at all.

This is how counsel put his argument. Since the state land was not made available, the respondent was no longer under an obligation to fulfill the condition in question. In support of his submission, Mr Yeoh relied on the decision of this court in *Sykt Bekerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan Bhd v Majlis Perbandaran Pulau Pinang* [1996] 2 MLJ 697, where it was held that the grant of planning permission creates a substantive right through the operation of the doctrine of legitimate expectation.

In our judgment, the present case bears no resemblance to the facts of *Sungai Gelugor*'s case. There, the local authority, having granted planning permission that was valid for a year, granted an extension of that permission

A subject to additional conditions. This court held that the Sungai Gelugor Co-operative Society, as the developer, had a legitimate expectation that the planning permission would be extended upon the same conditions as those imposed upon its grant.

In the appeal now before us, the condition relating to the construction B or upgrading of the monsoon drain was there from the very beginning. It was not subsequently imposed upon the respondent as was done in *Sungai Gelugor*. As we earlier observed, the respondent not only remained silent for three years after the imposition of the condition, but also completed 80% of the work before taking objection. In these circumstances, the doctrine of legitimate expectation has no application whatsoever to the C facts of the present appeal.

The learned judge has said, in his judgment, that it was unreasonable of the appellant to insist upon the compliance of the monsoon drain condition before it will issue the certificate of fitness for occupation. This argument is slightly different from the one advanced by Mr Yeoh before D us, and to which we have addressed ourselves thus far. We do not agree with the judge's conclusion. In our view, there was nothing unreasonable, in the circumstances of this case, in the appellant's insistence that the respondent fulfill the conditions subject to which planning permission was granted. It follows that the judge was wrong in granting the first declaration.

E We now turn to the second declaration. It has to do with the perimeter drain. In order to deal with this part of the case, it is necessary to recall some of the salient facts.

The requirement that the respondent construct a perimeter drain on its land did not appear as part of the planning permission. It appeared in F the earthworks plan. The learned judge held that that was not good enough. This is what he actually said about it:

> After careful consideration it is my view that it is wholly impermissible in law and without any justification in fact for this court to hold that the requirement in CAB 2 [the earthworks plan] pertaining to the construction of a perimeter drain should be read into or in conjunction with CAB 3 [the G amended plan]. My reasons are as follows:
>
> (a) CAB 2 — pertaining to earthworks operations, which is an entirely different stage in the development process of a land — was approved about two years before CAB 3 and under an altogether different legislation being the Street, Drainage and Building Act 1974. Due to a lapse of such a long period between the respective approvals of CAB H 2 and CAB 3, it would not be unreasonable for the plaintiffs to presume that CAB 2 had been deemed to be fully complied with upon approval of CAB 3 and that CAB 3 was intended to be the final and sole reference planning permission under the Act. Alternatively, it would appear that the very approval of the layout plan (CAB 3) presupposes the acceptance by the defendants that the earthworks had been I completed in accordance with CAB 2. Also, as it has been conceded that under the Act planning permission or a layout plan deals, inter

alia, with drains generally and of all categories of drains — indeed, here, the monsoon drain and the building drains are clearly indicated in CAB 3 — there is no valid or plausible reason why the concrete perimeter drain could not also be drawn into CAB 3. Consequently, its absence would indicate that such drain is not a requirement in the development of a five-storey building, though it may have been a requirement in respect of an 11-storey building (that was never built). A B

Furthermore, the earthworks plan cannot complement the approved amended layout plan, as in law it is the approved amended layout plan (CAB 3) together with the conditions endorsed thereon, and not the earthworks plan (CAB 2) that constitutes the planning permission. And the nature of the plan in CAB 3 itself does not permit the construction of the purported perimeter drain, having regard to sub-division of the land concerned and the conditions imposed thereto. C

(b) The earthworks plan (CAB 2) relates to earthworks required in respect of a 11-storey building whereas CAB 3 relates to the proposed construction of a five-storey building. As such, the specification or the very requirement for a perimeter drain may be different in the case of a smaller building structure. D

(c) To hold that an earthworks plan could be read in conjunction or together with a layout plan may hereafter give rise to a chaotic situation where, in the event of a situation occuring, obversely to the current case, in the two plans, a developer may probably contend that he is under no obligation to construct a perimeter drain shown in the layout plan because it is not in the earthworks plan approved earlier in time. E

(d) The very issuance of the layout plan (CAB 3) would have the effect of implicitly superseding the earthworks plan. This is a reasonable and sensible approach which the court has to take, a fortiori as, despite the defendants being clothed with sufficient and wide powers under s 22 of the Act to refuse or to impose conditions when granting planning permission, yet the defendants did not impose in CAB 3 the condition requiring the construction of a concrete perimeter drain. F

(e) The construction of a proposed concrete perimeter drain — if at all it was intended to be a requirement, despite its absence in CAB 3 — would create an absurdity, as such drain would run parallel along the center of the 40-feet road to be constructed by the plaintiffs and the Public Works Department. G

(f) To require that CAB 2 be read in conjunction with CAB 3 would also run foul of ss 91 and 92 of the Evidence Act 1950 and the established authorities. See *Faber Merlin (M) Sdn Bhd & Ors v Lye Thai Sang* [1985] 2 MLJ 380 and *Keng Huat Film Co Sdn Bhd v Makhanlall (Properties) Pte Ltd* [1984] 1 MLJ 243. H

(g) There is no ambiguity or defect in CAB 3 (the layout plan), and even if there is such defect or ambiguity, s 93 of the Evidence Act 1950 would exclude extrinsic evidence to amend or explain such document. Indeed, whatever the parties may in their heart of hearts have intended, only the intentions as expressed in CAB 3 may be construed. See *Goh Eng Wah v Yap Phooi Yin & Anor* [1985] 1 MLJ 329. I

(h) Section 70A(5) of the Street, Drainage and Building Act 1974 (as amended) is inapplicable as it was never contended that earthworks have not been completed.

(i) Since I have held that CAB 2 cannot be read into or compliment (sic) CAB 3, I would adopt the dicta of Mohd Dzaiddin J (as he then was), in *Rethina Development Sdn Bhd v Majlis Perbandaran Seberang Perai, Butterworth* (incidentally the same defendants) [1990] 2 MLJ 111 at p 114H, who had this to say:

> Based on the above facts, in my judgment, the MPSP had no power to add, amend or go behind the conditions imposed in the layout plan once approval of the said plan was granted.

In my opinion, that was an eminently correct approach to take; considering that a local authority has ample and wide powers under s 22(3) of the Act to impose such 'conditions as it deems fit' when granting planning permission, it would be wholly unfair and unjust to allow them to impose fresh conditions especially at the stage of issuance of occupation certificate of fitness, and after the developer — who is essentially also an investor of the state — had already incurred considerable construction expense. Regrettably, this has happened again in the current case involving the same local council.

For all the above reasons, I hold that the plaintiffs are under no obligations to build the concrete perimeter drain and the MPSP's requirement that this drain, which is not in CAB 3 (the layout plan), be constructed, as a condition for the issuance of an OCF is not justified in law and is ultra vires the Town and Country Planning Act 1976. The declaration sought as in prayer 3 of the plaintiffs' claim is thus also allowed.

With respect, we find ourselves unable to agree with the views expressed by the learned judge in the foregoing passages.

First, the learned judge has treated the Town and Country Planning Act 1976 and the Street, Drainage and Building Act 1974 as separate and unconnected pieces of legislation for the purposes of land development. Hence his use of the phrase 'an altogether different legislation' to describe the latter Act.

Now, there may be — and in this country, there are — several pieces of written law, both Acts of Parliament and subsidiary legislation, that regulate the development of land and the construction of or alteration to buildings. All these written laws contain requirements of one sort or another. Anyone proposing to engage in land development must observe the provisions of all the written laws that regulate this form of human activity.

It is, therefore, quite wrong to proceed upon the basis — as did the learned judge — that compliance with the conditions attaching to the planning permission granted under the Town and Country Planning Act 1976 is quite sufficient. Regard must also be had to the equally compelling

provisions of the Street, Drainage and Building Act 1974 which govern the carrying out of earthworks. A

With respect, the learned judge appears to have completely misunderstood the important role played by an earthworks plan in the context of land development. Earthworks play an important role in any development. It was in recognition of this that Parliament amended the Street, Drainage and Building Act by introducing s 70A, sub-ss (1), (2) and (3) of which read as follows: B

> 70 A(1) No person shall commence or carry out or permit to be commenced or carried out any earthworks without having first submitted to the local authority plans and specifications in respect of the earthworks and obtained the approval of the local authority thereto. C
>
> (2) Where the earthworks are to be commenced or carried out for the purpose of the construction of any building, street, drain, sewer, or embankment, or for the laying of any cable or pipe, or for the purpose of any other construction or work whatsoever, the plans and specifications relating to such construction or work required to be submitted under this Act or any by-laws made thereunder shall be submitted to the local authority at the same time as the plans and specifications in respect of the earthworks. D
>
> (3) In granting the approval under subsection (1) the local authority may impose such conditions as it deems fit. E

This provision, therefore, makes it quite clear that earthworks are an integral part of land development. Equally, it is clear that an earthworks plan is an important document. It follows that any conditions that are reasonably imposed by a local authority in relation to earthworks must be given the same importance as those conditions subject to which planning permission is granted under the parallel statute. F

The second point we make is this. The learned judge made the assumption that all the necessary earthworks had been completed at the date the respondent's amended plan was approved. As a matter of pure fact, the assumption made is wrong because the perimeter drains, which are very much a part of the earthworks, were never constructed. And there is no dispute about this. It follows that the reasoning of the learned judge lacks the necessary factual basis and his conclusion upon the point is a *non sequitur*. G

We now turn to deal with the third, and probably the most important, ground upon which the learned judge based his conclusion. In the passages of his judgment which we have reproduced earlier, the learned judge has made it clear that he relied on the extrinsic evidence rule housed in ss 91, 92 and 93 of the Evidence Act 1950 to justify his conclusion that the two plans — the approved amended layout plan and the earthworks plan — ought not to be read together. In the result, he held the appellant to have acted unreasonably in requiring the respondent to satisfy a new requirement as a condition for the issue of the certificate of fitness. H I

A In our judgment, the reasoning of the judge suffers from a serious infirmity. The authorities referred to and relied upon by him that deal with the extrinsic evidence rule deal with bilateral instruments in private law. *Faber Merlin (M) Sdn Bhd & Ors v Lye Thai Sang & Anor* [1985] 2 MLJ 380 was a case that concerned the interpretation of a sale and purchase B agreement that related to a building, while *Keng Huat Film Co Sdn Bhd v Makhanlall (Properties) Pte Ltd* [1984] 1 MLJ 243 and *Goh Eng Wah v Yap Phooi Yin & Anor* [1985] 1 MLJ 329 were cases that concerned the construction of a covenant in a lease. The task of the court in these cases was confined to ascertaining the objective intention of contracting parties.

C The present case calls for no such exercise. What is involved here is the rather simple question whether the requirements imposed by the appellant under the power given it by one or more of the statutes that regulate the use of the environment have been met. This the learned judge unfortunately did not appreciate. Neither did he recognize the irrelevance of the authorities cited by counsel for the respondent and relied upon by D him in his judgment. He failed to realize that he was dealing with a public law case and not a construction summons taken out to interpret the clauses in a private document. That led him to the error into which he fell.

In the present case, there are at least three plans. There is the original plan for an 11-storey building. Then, there is the earthworks plan. Finally, E there is the amended plan for a five-storey building, submitted by the respondent after construction had commenced. Although each may deal with different aspects, they all relate to the same project. For that reason, they must be read together. The judge was wrong when he said the opposite.

F It follows that it is no answer for the respondent to say that it has met with all the conditions appearing on the amended approved layout plan. It must also comply with the conditions that appear on the earthworks plan. The condition about the perimeter drain may not appear on the approved amended layout plan. But it appears on the earthworks plan. That is G sufficient. The judge treated it as a condition that was imposed later by the appellants. He was wrong in his perception of the facts, because that is not how it happened. Acting upon an erroneous fact pattern, he applied the dictum of Mohd Dzaiddin J in *Rethina Development*. That is certainly a misdirection. It has occasioned a miscarriage of justice in this case.

H The fourth and last point made by the judge is that the condition in question gives rise to an absurdity because the perimeter drain, if constructed, would run along the centre of a 40-feet road to be constructed by the respondent and JKR. This point caused us some anxiety when Mr Yeoh first mentioned it during his submissions. However, Dato Zaki has carefully taken us through the relevant indorsements on all the relevant I plans and demonstrated that the judge misunderstood the evidence on the point. Having read with care the three plans earlier mentioned, we are satisfied that the absurdity referred to by the judge does not exist.

Could it then be said that the appellant was acting unreasonably in withholding the certificate of fitness? We do not think so. That the law requires them to act as they have done is borne out by by-law 25(1)(b) of the Uniform Building By-Laws 1984 (being subsidiary legislation made under the Street, Drainage and Building Act 1974) which provides as follows:

> 25(1) Certificate of fitness for occupation of a building shall be given when —
>
> (a) ...
>
> (b) all essential services, including access roads, landscape, car parks, drains, sanitary, water and electricity installation, firelifts, fire hydrant and others where required, sewerage and refuse disposal requirements have been provided.

For these reasons, the learned judge was wrong in granting the respondent the second declaration.

There is one last matter that requires our attention. It is the order of the learned judge directing an inquiry into damages.

We must say at once that nowhere in its summons did the respondent ask for an *award* of damages. It merely asked for an *assessment.* This is altogether wrong. Before an inquiry into or an assessment of damages may take place, there must be a judgment awarding damages, for it is only under a judgment awarding damages that an assessment or inquiry may take place. Though none saw it, the point is critical.

For present purposes, however, it is sufficient to state that the order made by the learned judge really impinges upon the declarations he had granted. Once these are set aside, the order for assessment falls to the ground, automatically and without more. We therefore do not propose to deal with the brief complaint mounted on substantive grounds made by Dato Zaki in the course of his submissions.

However, we will say this much. The respondent's case — when put at its highest — alleged 'Wednesbury unreasonableness', not malice. Yet, the judge held that the appellant had acted in bad faith and out of malice. Having examined the relevant material in the record provided, we are entirely satisfied that there was absent any material to support this finding. We therefore deprecate, in the strongest of terms, the criticism levelled by the judge against the appellant in that part of his judgment when he came to deal with the issue of damages. The severity of the language employed by him to describe the conduct of the appellant was certainly not called for. All the appellant was doing in this case was merely carrying out the duty imposed upon it by Parliament. And the learned judge ought to have recognized this.

Having carefully considered this matter, we find the reasoning of the judge to be fatally flawed. For the reasons given in this judgment, we have no alternative but to allow this appeal. The declarations granted by the learned judge are hereby set aside. So is the order directing an assessment of damages. The respondent's originating summons is hereby dismissed.

A The costs of the proceedings in the High Court and the costs of this appeal shall be taxed and paid by the respondent to the appellant. The deposit paid into court by the appellant is to be refunded to it.

Order accordingly.

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Reported by Isabel Liong

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